Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

WILLIE CASE,

Petitioner,

vs.

OTIS KINSEY, an individual; GARY MONTGOMERY, an individual,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether "self-defense" of property is cognizable as a "good faith" defense in a civil action for interception of wire communications.

II Whether there was a clearly erroneous and conflicting application law relating to the business extension exemption promulgated by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 which has been adopted by this Court and other circuit court decisions.

II Whether jurisdiction should have been deferred to the State court proceedings wherein jurisdiction over the parties had been invoked prior to the federal court action.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Appendix B - Opinion of the United States Court of Appeals for the Tenth Circuit dated October 2, 1998.

No.

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WILLIE CASE,

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Willie Case, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The United States District Court for Western District of Oklahoma granted judgment in favor of Otis Kinsey and Gary Montgomery, individually on July 8, 1997. (Appendix "A"). Case thereafter filed his notice of appeal on August 7, 1997 to the United States Court of Appeals for the Tenth Circuit. On October 2, 1998, the Appeals Court affirmed the decision of the District Court. (Appendix "B").

STATEMENT OF JURISDICTION

The date of the judgment sought to be reviewed is October 2, 1998. The court from which relief is sought is the United States Court of Appeals for the Tenth Circuit. This Court has jurisdiction pursuant to 28 United States Code § 1254.

STATUTE INVOLVED

The pertinent provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 United States

Code §§ 2510-2520, ("Title III") is set forth below:

> §2510(1) 'wire communication' means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications for communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication;
>
> (2) 'oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;
>
> (4) 'intercept' means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device;
>
> (5) 'electronic, mechanical, or other device' means any device or apparatus

which can be used to intercept a wire, oral, or electronic communication other than–

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who–

(a) intentionally intercepts, endeavors to intercept or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral

communication when–

. . . . . .

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

. . . . . .

(e) (i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511 (2)(A)(ii). . . . . shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5). . . . . .

. . . . . .

(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person–

(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

§ 2520 Recovery of civil damages authorized

(a) In general. –Except as provided in section 2511 (2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate;

. . . . . .

(c) Computation of damages.–(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortuous or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows;

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511 (5) and has not been found liable in a prior civil action under this section, the court shall assess the grater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

. . . . . .

> (2) In any other action under this section, the court may assess as damages whichever is the greater of–
>
> (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
>
> (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

STATEMENT OF THE CASE

The Appellate Court's jurisdiction was invoked pursuant to FRAP Rule 3. The standard of review for an appeal from a summary judgment is de novo. The Court of Appeals applied Seymore v. Shawver & Sons, Inc., 111 F.3d 794, 797 (10th Cir.), cert. denied, 118 S.Ct. 342 (1997), and affirm.

Case and Respondents , Kinsey and Montgomery, were, at all times relevant to this action, school teachers at Douglass High School in Oklahoma City, Oklahoma. For several years prior to school year 1994-95, Case had been subjected to various false charges from Kinsey and Montgomery concerning his stability as a teacher/coach –all in

an attempt to cause Case's termination. Case met with the principal of the high school, Walter O. Mason, in an attempt to curtail and eliminate unwarranted and unlawful attacks being lodged against him by Respondents. However, the principal informed Case that there was nothing that could be done concerning his complaint against Kinsey and Montgomery as he lacked any proof of their unlawful conspiracy to cause his termination. On several occasions Case accessed his extension telephone only to hear Respondents plotting an evil and unlawful plan to cause his termination. Case's classroom telephone is one of many classroom extension telephones in the high school that are connected to the principal office. These classroom extension telephones are used by the teachers and students. It is well known by all of the teachers, other school support personnel and most students that all of these telephones can be monitored from the principal's office or from any other extension. Case had already received notice of

termination on two prior occasions, which he contended were based on false and unlawful conduct of the Respondents. Being fearful of termination procedures for the third time, Case, after randomly picking up his classroom extension telephone and hearing the Respondents plot a course of action to cause him harm and employment termination, he began tape recording telephone calls from his classroom extension phone. At no time were the contents of the recordings 'intentionally" disclosed. The "disclosure" came when the lawyers representing Kinsey and Montgomery filed discovery requests and compelled production of the tapes. This hardly raises the bar in establishing intent to disclose. Case verily believed that he was not violating any state, federal or local law in making tape recordings from his personal extension phone and that the reasons that he made the same were to guard against a wrongful termination. Case had been charged with sleeping on the job, theft of school property, inter alia, prior to making any

tape recordings --- all of which accusations Case contends were false and without merit and unlawfully orchestrated by the Respondents.

On January 16, 1996, Case filed a Petition in the District Court of Oklahoma County, Oklahoma, wherein the Respondents herein were named defendants. On June 3, 1996, Gary Montgomery, the defendant in the state action, filed his Answer in state court. On June 3, 1996, Otis Kinsey, the defendant in the state action, filed his Answer in state court.

The trial court found that "...the intercepting device was the telephone extension and not the recording device." The trial court also found that "...the phone system and the extension phone were acquired `for connection to the facilities' of the phone company." The trial court found "...that the Defendant intercepted the personal calls for a purely private purpose, not for any legitimate business purpose. As a result, the recording was not done in the ordinary course of business."

The trial court addressed and denied Case's claim of

"good faith" and "self-defense". The trial court did not address and consider evidence and law presented challenging its jurisdiction.

In the case at bar, "in excess of thirty (30)" other classrooms extension telephones are connected to the principal's office. As asserted previously, it is well known by all teachers, school support personnel, and most students that all of these extension phones can be monitored from the principal's office, as well as from any of the extensions. All of the subject telephone extensions are owned by the school. The Respondents contended that Case invaded their privacy in recording their conversations without their consent and in violation of 18 U.S.C. § 2510.

REASONS FOR GRANTING WRIT

This Court should grant the writ because an important question of federal law being raised as a case of first impression. The application of the right to be secure in one's property encompasses a right to defend the same against

unlawful encroachments or deprivations -- which has heretofore been cognizable by this Court as a affirmative defense of self defense. Recording conversations detailing a conspiracy to deprive that individual of both a vested property interest in his employment and of his civil rights–has not been, but should be settled by this Court.

ARGUMENT

PROPOSITION I

BOTH THE TRIAL COURT AND THE APPEALS COURT HELD THAT SELF-DEFENSE IS NOT COGNIZABLE AS A GOOD FAITH DEFENSE

In United States v. Hoffa, 436 F.2d 1243 (7th Cir. 1970), cert. denied January 11, 1971, 91 S.Ct. 455, 457, the This Court said:

> [1] Alderman v. United States, supra, 394 U.S. at page 179, 89 S.Ct. 961, N. 11, explains that the Fourth Amendment protects reasonable expectations of privacy. Surely, there was no expectation of privacy as to the Hoffa calls in

> Detroit which were exposed to everyone in that area who possessed a F.M. radio receiver or another automobile telephone tuned in to the same channel. See Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

This decision by the Tenth Circuit in affirming the trial court runs counter to the decisions of this Court as well as its own decisions relating to "expectations of privacy" under these factual circumstances. The trial court found that "...the intercepting device was the telephone extension and not the recording device" —yet it found the classroom extension phones were being used for "personal" calls rather than in "the ordinary course of business"—the record is silent and unsupportive of such conclusion. § 2510(5) on its face has been misconstrued and misapplied. § 2511(1)(c)(e) mandates that a finding of intent to "disclose". Being compelled to turn over documents as a result of judicial proceedings that are filed

and driven by lawyers representing the Respondents should not be accepted as proof of intent to "disclose".

PROPOSITION II

EXPECTATION OF PRIVACY AND ORDINARY COURSE OF BUSINESS REQUIREMENTS ARE IN CONFLICT WITH DECISIONS OF THIS COURT AND WITH STATUTORY AUTHORITY

Oklahoma Statutes, Title 13, Section 176.8 (C). "An expectation of privacy is a question of intent which may be inferred from words, acts, and other objective facts" id. at 287; U.S. v. Garcia, 42 F.3d 604 (C.A. 10 New Mexico 1994), holding "a subjective expectation of privacy is protected `only if society recognizes that expectation as reasonable or justifiable'..." id. at 605; U.S. v. Caudill, 43 F.3d 1484 (C.A. 10 New Mexico 1994), holding:

> To successfully claim Fourth Amendment protection in property, a person must have `a legitimate expectation of privacy in the invaded place.' Rakas v. Illinois, 439 U.S. 128, 143

(1978). The record does not contain any substantial evidence that defendant had a reasonable expectation of privacy in his workplace.

In the case at bar, the Respondents did not dispute that Case overheard them wrongfully conspiring to cause his termination. The Respondents' expectation of privacy was nothing more than "a subjective expectation of not being discovered." In view of the thirty plus extension phones, the Respondents knew or should have known that anyone, including students, could listen to their telephone conversations. Conversely, the telephone was there for Case's use or any teacher or student's use. Certainly, under the totality of circumstances, conversations between the Respondents could not be said to be "private." The Respondents were criminally conspiring to cause injury and harm to Case, including an unlawful deprivation of a vested property right in his employment. They abandoned their claim for actual damages

because they could show none, as noted by the trial court. They in turn elected to seek statutory damages (which are actually based upon "equity") while not denying "dirty hands." They cannot deny that the information obtained by the Case was also "readily available to the public".

In the case at bar, Case's affirmative defense was never considered by the Court and thereby denied him of due process and equal protection of the laws as guaranteed under the Constitution. Since one has a right of self-defense of his person and his property, the question for the Court to have considered was whether or not in view of the evidence, the conduct of the Case was reasonable under the circumstances. He had been terminated once and recommended for termination on a second occasion because of the Respondents' wrongful and malicious conduct. A reasonable expectation of "necessity" compelled him to defend from this unlawful infringement and attempted deprivation of a vested property interest in his employment. See Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558 (1987); INS

v. Chada, 462 U.S. 919, 103 S.Ct. 2764 (1983); and, Gilmore v. Taylor, 113 S.Ct. 2112 (1993).

PROPOSITION III

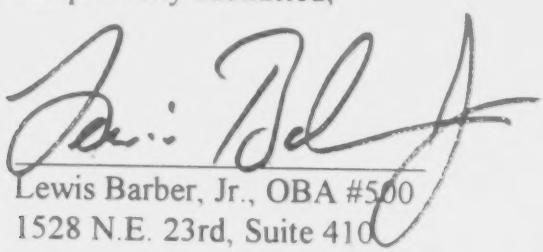
ALL PARTIES WERE PROPERLY JOINED IN THE STATE FORUM AND FEDERAL COURT SHOULD HAVE DEFERRED JURISDICTION

Case brought an action against the Respondents, inter alia, in state court on January 16, 1996. Notwithstanding reference to the record and cited authority, the Appeals Court held to the contrary. Case's argument in the Court below was not addressed. Appellant contends that jurisdiction was in the state court and the federal court should have yielded to the proceedings in state court.

CONCLUSION

Wherefore premises considered, Case prays that this Honorable Court reverse the decision of the of the Court of Appeals and remand this case for further proceedings.

Respectfully submitted,



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Appendix "A"

ORDER FILED JULY 8, 1997

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

ODIS KINSEY, an individual,) and GARY MONTGOMERY) an individual,	)	
Plaintiffs,	)	
v.	)	Case No. CIV-96-1902-C
WILLIE CASE,	)	
Defendant.	)	

ORDER

Before the court are the motion of Plaintiffs, Otis Kinsey and Gary Montgomery, for summary judgment, and the motion of Defendant Willie Case to dismiss, or in the alternative, for summary judgment. After careful review of the motions and supporting briefs, responses and replies thereto, and the applicable law, the Court finds that Plaintiffs' motion for summary judgment should be granted in part and denied in part

and Defendant's motion to dismiss, or in the alternative for summary judgment, should be denied.

Plaintiffs bring their complaint against Defendant pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, ("Title III"), 18 U.S.C.§2510-2520 and state tort law. Title III provides a civil remedy in favor of any person whose wire or oral communication in intercepted, disclosed, or used in violation of 18 U.S.C. § 2511(1).

Although Defendant has moved to dismiss, he fails to support his motion with any cogent legal justification warranting a dismissal of the action at this stage of the proceedings. Consequently, the Court finds that Defendant's motion to dismiss should be denied. The Court will address the cross-motions for summary judgment simultaneously.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P.56(c). On summary judgment motion, the court is required to pierce the pleadings and evaluate the actual proof to determine whether summary judgment is appropriate. id. at Advisor Committee Notes. In determining whether a genuine issue of material fact exists, all facts and inferences should be viewed in the light most favorable to the nonmoving party. Burnette v. Dow Chemical Co., 849 F.2d 1269 (10 Cir. 1988).

Undisputed Material Facts

1. Plaintiffs and Defendant were, at all times relevant to this action, school teachers a Douglass High School in Oklahoma City, Oklahoma.

2. The Defendant's classroom telephone is one of many classroom telephones in the high school that are connected to the principal's office by specialized extensions.

3. These telephones are used by the teachers, and on occasions, and for limited purposes, students.

4. The Defendant personally heard over his extension telephone the Plaintiff's making plans to orchestrate Defendants' termination.

5. Fearing that he would be terminated because of false accusations of the Plaintiffs, Defendant began tape-recording all telephone calls from his extension.

6. For a period of time commencing in January, 1995, and continuing through March, 1995, the Defendant caused an electronic recording device to be attached and installed upon his personal extension phone.

7. Through the use of the electronic recording device, Defendant tape-recorded telephone conversations between the Plaintiffs and third parties.

8. Defendant recorded approximately eighteen (18) cassette tapes of Plaintiff's, and presumably others, phone

conversations. There are at least forty-seven (47) calls between Plaintiff Otis Kensey and various third parties and nineteen (19) calls between Plaintiff Gary Montgomery and various third parties.

9. Defendant's recording of Plaintiff's telephone conversations was accomplished without their consent.

10. Defendant believed that he was not violating any state, federal or local law in making tape recordings from his personal extension phone for the purpose of guarding against a wrongful termination.

11. Defendant made copies of the recordings and disclosed them to his attorney, Mr. Lewis Barber, as well as to Timothy M. Melton, attorney for parties in a related state court action.

12. The telephone system used at Douglass High School was purchased from and supplied by Executone of Oklahoma.

13. Prior to the events in question here, the telephone used in the room occupied by Defendant was stolen by an unknown person and its replacement was purchased from Wal-Mart.

Discussion

I Liability under Title III

Title 18, United States Code, section 2511 makes it unlawful for any person to willfully intercept, use or disclose any "wire, oral or electronic communication." If a violation of §2511 occurs, the persons whose conversations were illegally monitored can seek civil damages under 18 U.S.C. §2520. The United States Supreme Court has stated that "[t]he purpose of the legislation ... was effectively to prohibit ... all interceptions of oral and wire communications, except those specifically provided for the Act ..." *United States v. Giordano*, 416 U.S. 505, 514 (1974).

To prevail under §2520, a plaintiff must first show that his telephone conversation was a wire communication within the

meaning of 18 U.S.C. § 2510(1) or an oral communication within the meaning of 18 U.S.C § 2510(2). As defined by § 2510 (1):

> "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

id. "A telephone conversation is a wire {communication}." *Forsyth v. Barr*, 19 F.3d 1527, 1534 (5th Cir.), *cert. denied*, 513 U.S. 871, (1994) (quoting *Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414, 417 (5th Cir. 1980)). In the present case, the parties do not dispute that Plaintiffs' conversations between themselves and various third parties constitute a wire communication within the meaning of the statute.

Having determined that the conversations are a wire communication, the court must next determine whether they were intercepted within the meaning of 18 U.S.C § 2510(4), where 'intercept' is defined as the 'aural acquisition of the contents of

any wire...communication through the use of electronic, mechanical, or other device." The recording of a telephone conversation alone constitutes an "aural acquisition" of that conversation. *See Sanders v. Robert Bosch Corp.*, 38 F.3d 736, 740 (4th Cir. 1994). But, that is no interception, and thus no liability under Title III, if the aural acquisition is through the use of an instrument that falls outside the definition "electronic, mechanical, or other device."

The term "electronic, mechanical, or other device" is defined in § 2510(5):

> "Electronic, mechanical or other device" means any device or apparatus which can be used to intercept a wire...communication other than (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;...

Id. Thus, the telephone-extension exemption "places outside the reach of Title III the monitoring of communications carried out by certain types of equipment and done in the ordinary course of business." *Williams v. Poulos*, 11F.3d 271, 279 (1st Cir. 1993). When §§2510 (4) and (5) are construed together, they create an exemption for extension or business extension telephones. *United States v. Murdock*, 63 F.3d 1391 (6th Cir. 1995), cert. Denied, __U.S. __, 116 S. Ct. 1672 (1996).

Defendant contends that he did not record conversations "through the use of any electronic, mechanical, or other device" (as defined in the statue) because his recording technique qualifies under the telephone-extension exemption. The first prong under this exemption is whether the equipment used by Defendant to intercept Plaintiff's conversations qualifies as §2510(5)(a) equipment. There two ways this prong can be met; (1) the provider of wire communication service furnished the equipment in the ordinary course of its business, or (2) the

subscriber or user furnishes the equipment for connection to the wire communication facilities. *See Sanders*, 38 F.3d at 740n.9.

The Court must first decide, however, what device intercepted the conversations? Is it the telephone extension or the recording device? In this regard, it is undisputed that Defendant attached a recording device to the telephone extension in his office to record conversations emanating from other extensions attached to the same telephone line. When presented with similar fact, courts have wrestled with the issue of whether the telephone extension itself or the recording device intercepted the conversations. See, e.g., *United States v. Murdock*, 63 F.3d at 1396 (recording equipment attached to two extension phones and used to record phone calls for three months not within the business extension exemption), *Sanders*, 38 F.3d at 740 (recording equipment know as "voice logger," rather than an extension telephone installed by the local phone company, was the intercepting device); *Deal v. Spears*, 980 F2d 1153, 1158 (8th

Cir. 1992)(the recording device was the intercepting device for purposes of § 2510(5)(a)(i) because, without it, the communications could never have been heard).

On the other hand, two circuits, including the Tenth Circuit, have held that the intercepting device is the telephone extension, not the recording device. In *Epps v. St. Mary's Hospital*, 802 F.2d 412 (11th Cir 1986), calls coming into and going out of a dispatch console were automatically recorded onto a double-reel tape recorder. The court held that the intercepting device was the dispatch console rather than the recording equipment. id. At 415-16. Similarly, *United States v. Harpel*, 493 F.2d 346 (10th Cir. 1974), held that where a call is recorded by attaching a suction cup to a telephone receiver and connecting it to a tape recorder, the receiver is the intercepting device, not the recorder. The court explained:

> A recording device placed next to, or connected with, a telephone receiver cannot itself be the 'acquiring' mechanism. It is the receiver which serves this function - the recorder is a mere accessory designed to preserve the contents of this

> communication. This interpretation comports squarely with the clear distinction drawn between 'intercepting' and 'recording' under U.S.C. §2518 (8)(a), which deals with judicially authorized interception...We therefore conclude that the tape recorder in question cannot constitute the intercepting mechanism when used, as it is argued here, connected to a telephone receiver.

id. at 350.

In the present case, this Court is bound by Tenth Circuit precedent and must therefore determine that the intercepting device was the telephone extension and not the recording device. The court must therefore proceed to determine whether the telephone-extension exception applies.

Plaintiffs argue that the phone system used at Douglass High School was purchased from and supplied by Executone of Oklahoma which is not a "communications common carrier" within the meaning o § 2510(5)(a)(i). Furthermore, they argue that the extension telephone used by Defendant to record the conversations was purchased from Wal-Mart which also is not a "communications common carrier." Since the phone company did not furnish either the telephone system or the extension used

by Defendant, by definition the telephone-extension exemption cannot apply in the instant case.

Plaintiffs' argument ignores the plain language of the statute. Even if Executone of Oklahoma and Wal-Mart are not providers of wire communication service, the phone system and the extension phone were acquired "for connection to the ~~facilities~~" of the phone company. Therefore, the first prong of the telephone-extension exemption is satisfied.

The second prong requires the court to consider whether Defendant used the intercepting equipment in the ordinary course of business. This determination is facilitated by the Tenth Circuit opinion in *Harpel* where the court held "as a matter of law, that a telephone extension used without authorization or consent to surreptitiously record a private telephone conversation is not used in the ordinary course of business." *Harpel*, 493 F.2d 351. See also *Murdock*, 63 F.3d at 1400 (the Sixth Circuit concluded that a wife's pervasive recording of her husband's conversations

on a business phone extension did not constitute use of an extension phone in the ordinary course of business); *Sanders*, 38 F.3d at 741 (the Fourth Circuit found that "[c]overt use of surveillance device must be justified by a valid business purpose"), *Deal*, 980 F.2d at 1158 (the Eighth Circuit held that the defendant's indiscriminate recording of his employee's personal calls did not fall within the telephone-extension exemption); *Watkins v L.M. Berry & Co.*, 704 F.2d 577, 583 (11th Cir. 1983)(the court held "that a personal call may not be intercepted in the ordinary course of business under the exemption in section 2510(5)(a)(i), except to the extent necessary to guard against unauthorized use of the telephone or to determine whether a call is personal or not").

In the present case, it is undisputed that Defendant indiscriminately recorded Plaintiffs' personal telephone calls, 47 of Plaintiff Kinsey's calls and 19 of Plaintiff Montgomery's. In defense, Defendant argues that the purpose for his recording was

to guard against a wrongful termination that he believed Plaintiffs were orchestrating. Plaintiffs do not dispute this argument. Applying the undisputed facts to the relevant law, this Court finds that Defendant intercepted Plaintiff's personal calls for a purely private purpose, not for any legitimate business purpose. As a result, the recording was not done in the ordinary course of business. Therefore, Defendant cannot satisfy the second prong of the telephone-extension exception, and such defense is unavailable to preclude liability in this case.

Defendant also raises a "good faith" defense to liability under Title III. He argues that he believed he was not violating any law in making tape recordings from his personal extension phone. Again, Plaintiffs do not dispute this argument. Title III expressly provides a good faith defense in a limited number of instances including reliance on a court-authorized warrant or order, grand jury subpoena, or legislative or statutory authorization. See 18 U.S.C. §2520(d). But a "good faith"

defense based upon a mistake of law, such as that asserted by Defendant, is not listed in the statute among the various defenses available under Title III. Furthermore, the Tenth Circuit has specifically held that a "good faith" defense based upon a mistake of law is not available under Title III. *Heggy v. Heggy*, 944 F.2d 1537, 1541 (10th Circuit1991), *cert. denied*, 503 U.S. 951 (1992)(citing *Campiti v. Walonen*, 611 F.2d 387,394-95 (1st Cir. 1979)). Consequently, Defendant's good faith defense must fail.

Defense next raises the defense of self-defense because, he was defending himself from Plaintiffs' false accusations. Again, this defense is not among those listed in the statue, and Defendant has wholly failed to provide the Court with any case law establishing that this defense has been successfully raised in an action under Title III. Defendant's claim of self-defense is without merit.

Finally, Defendant argues that this Court should weigh Defendant's constitutional rights under the Fourth, Fifth and

Fourteenth Amendments against congressional intent in passing Title III and find that an injustice would occur by the application of Title III in this case. Defendant again fails to direct the Court to any controlling law in this regard. Absent a constitutional defect, which Defendant does not allege in this case, a court will give effect to a statute as Congress has written it. *Badaracco v. Commissioner of Internal Revenue*, 464 U.S. 386, 398 (1984)("[c]ourts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement"). If a statute is ambiguous or where Congress is silent, a court can proceed by assuming that Congress authorizes it to prevent manifest injustice. *United States v. 1002.35 Acres of Land*, 942 F.2d 733, 736 (10th cir. 1991). However, Defendant fails to argue that the statute is vague or ambiguous. This court should therefore give effect to Title III as it is written, and it must decline defendant's invitation to ignore the statute and its application.

Since the court has determined that Defendant illegally intercepted the Plaintiffs' wire communications, it must further determine whether Defendant committed a disclosure or use violation under Title III. In a civil action under the statute, a plaintiff must demonstrate "1) the information used or disclosed came from an intercepted communication, and 2) sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of Title III." *Thompson v Dulaney*, 970 F.2d 744, 749 (10th Circuit 1992). This Demonstration includes a showing that any statutory exceptions or exemptions asserted by a defendant do not, in fact, apply. id. Although a defendant may be presumed to know the law, *see Penny v. Giuffrida*, 897 F.2d 1543, 1547 (10th Cir. 1990)("citizens are presumed to know the law)(citing *Heckler v. Community Health Servs. Of Crawford County, Inc*, 467 U.S. 51, 63 n.17 (1984), to establish disclosure liability under Title III,

a defendant must be shown to have been aware of the factual circumstances that would violate the statute.

In the present case, the Court has already determined that Plaintiffs' wire communications were intercepted and that none of the defenses or exemptions asserted by Defendant apply. Although Defendant's ignorance of the law is undisputed, his ignorance is irrelevant. It is further undisputed that the contents of the tape-recordings were disclosed to Defendant's attorney herein, Mr. Lewis Barber, and to Mr. Timothy M. Melton, an attorney for parties in a related state court proceeding. In addition, Defendant clearly possessed sufficient knowledge of the facts concerning the interception of Plaintiffs' conversations that he court determine that his conduct violated the statute. Therefore, the court concludes that Defendant's disclosure of the intercepted conversations to two other persons constitutes a violation of the disclosure provision of § 2511.

Accordingly, summary judgment as to liability should be

granted in favor of Plaintiffs on their federal statutory cause of action.

II. Damages under § 18 U.S.C. § 2520

With respect to available relief under Title III, the statute provides, "In an action under this section, appropriate relief includes (1) such preliminary and other equitable or declaratory relief as may be appropriate; (2) damages under subsection (c) and punitive damages in appropriate cases; and (3) a reasonable attorney's fee and other litigation costs reasonable incurred." 18 U.S.C. § 1252(b). Under subsection (c), a court may award damages calculated by determining "the greater of (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000." Id. at §2520(c)(2).

A. Statutory damages

Plaintiffs in the instant case do not seek actual damages;

rather, they request that the court award them statutory damages in the amount of $10,000 per recorded conversation plus $10,000 per disclosure for two separate disclosures. Thus, they contend that Plaintiff Kinsey is entitled to statutory damages in the amount of $490,000 (47 conversations plus 2 disclosures = 49 violations x $10,000), and Plaintiff Montgomery is entitled to statutory damages in the amount of $210,000 (19 conversations plus 2 disclosures = 21 violations x $10,000).

A review of the statute reveals that statutory damages are calculated either on a per day basis or a flat amount of $10,000, whichever is greater. The statute does not provide for an award of $10,000 per violation as argued by Plaintiffs. Although Plaintiffs rely on the *Heggy* case to support their calculation of damages as $10,000 per violation, that case is clearly distinguishable. The $75,000 award to Plaintiff there was described as "compensatory" damages. *Heggy*, 944 F.2d at 1538. The court did not specify whether this damage award was

for "actual" damages or "liquidated" damages as set out in the former statute. Thus, it is merely speculative to assume that the $75,000 was awarded as liquidated damages rather than actual damages. Plaintiffs have not pointed to, and the Courts independent research has failed to reveal, any published opinion where the statutory amount of $10,000 was awarded for each conversation that was intercepted or disclosed.

In addition, it is well-established that, pursuant to § 2520(c)(2)(B), statutory damages in the amount of $10,000 may be awarded for interception and a separate $10,000 may be awarded for disclosure because they are considered two separate violations of § 2511. See, e.g., *Deal*, 980 F.2d at 1156 n.6 (no appeal of award of $10,000 for interception and $10,000 for disclosure); *Bess v. Bess*, 929 F.2d 1332, 1334 (8th Cir. 1991)(court determined that "use" of the intercepted contents constituted a separate violation of § 2511 and awarded separate damages); *Rodgers v. Wood*, 910 F.2d 444, 446 (7th Cir.

1990)(court awarded $10,000 for two intercepted conversations and $10,000 for at least four disclosures). As a result, if the Court determines that damages are appropriate under § 2520, Plaintiffs will be entitled to no more than $20,000 in statutory damages, $10,000 for interception and $10,000 for disclosure.

With regard to whether an award of statutory damages is appropriate, recent decisions from the Fourth and Eighth Circuits held that the decision whether to award damages under §2520 (c), rather than being mandatory as assumed by Plaintiffs, is discretionary with the trial court. *Nalley v. Nalley*, 53 F 3d 649 (4th Cir. 1995); *Reynolds v Spears*, 93 F 3d 428 (*8th Cir. 1996). But *see Rodgers*, 910 F 2d at 448 (the court found that the statute compelled an award of statutory damages upon its finding a violation of Title III). In both *Nalley* and *Reynolds*, the circuit courts focused on the word "may" as found in § 2520 (c)(2), where the statute provides that "the court *may* assess as damages whichever is the greater of . . ." In contrast, prior to the

1986 amendments to the statute, § 2520 provided that "[a]ny person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall... be entitled to recover...actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1000, whichever is higher." Both the Eighth and Fourth Circuits noted that the change in language from the mandatory to the permissive was clear. To the fourth Circuit, the clear language of the statute was controlling. See *Nalley*, 53 F.3d at 652-53.

But, the Eighth Circuit went further in its construction of the statute. It recognized that the word "may," although it normally implies some degree of discretion, "can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute." *Reynolds*, 93 F.3d(quoting *United States v. Rodgers*, 461 U.S.

677, 706 (1983)(footnotes and citations omitted)). The court concluded that the legislative history was silent on the issue. id. The court next looked for "obvious inferences from the structure and purpose of the statute" that the word "may" was intended to have something other than its ordinary meaning. id. at 435. It found none. The court concluded therefore that the district court did not err in holding that it had discretion to decline to award statutory damages. id.

Although the Tenth Circuit has not addressed this issue, this Court finds persuasive the reasoning and conclusion of both the Fourth and Eighth Circuits. Consequently, the Court finds that, pursuant to § 2520(c)(2), discretion is vested in this Court to either award damages as authorized by the statute, or to award no damages at all.

In exercising their discretion, courts have considered the following factors relevant to an award of statutory damages: (1) the extent of the violation; (2) the existence or non-existence of

actual damages; (3) whether any useful purpose would be served by awarding statutory damages, (4) the existence of a reasonable purpose for a disclosure of the intercepted conversations; and, (5) the relative financial burdens on the parties. *See Reynolds*, 93 F.3d at 435-36, *Nalley*, 53 F.3d 653-54; *Shaver v. Shaver*, 799 F. Supp.576 (E.D.N.C. 1992). Of course, none of these circumstances is a defense to the violations, but they merit consideration in the discretionary award of statutory damages.

With regard to statutory damages for Defendant's interception of Plaintiffs' telephone conversations, the court finds that the interception is sufficiently egregious to warrant an award of statutory damages in favor of Plaintiffs. It is undisputed that Defendant indiscriminately tape-recorded all telephone calls from his extension phone without regard to the parties' identities and the content of the conversation. Although Defendant states that the purpose for which he planned to use the conversations was to guard against a wrongful termination of his employment, he made

no effort to ensure that the conversations he recorded were related to his stated purpose. Defendant recorded all calls made from the telephone extension without regard to content, presumably even those made by other unsuspecting staff and students of Douglass High School. In addition, the number of calls intercepted, 47 of Plaintiff Kinsey's conversations and 19 of Plaintiff Montgomery's, and the three-month length of time the recording occurred resulting in a total of eighteen cassette tapes of such conversations, militate in favor of an award of statutory damages. The court determines therefore that Plaintiff Kinsey and Montgomery are each entitled to an award of damages under § 2520(c)(2)(B) in the amount of $10,000.

However, the Court finds that an award of statutory damages is unwarranted for Defendant's disclosure of the recordings. It is undisputed that the recordings were disclosed only to two attorneys. One of the attorneys is Defendant's own counsel, and the other, Mr. Timothy M. Melton, represents

parties in a related state court proceeding. The purpose for which the recordings were disclosed was to aid Defendant's participation in the state court proceeding. There is no evidence of widespread disclosure or use of Plaintiffs' intercepted conversations, and Plaintiffs sustained no actual damages as a result of the disclosure. Defendant's disclosure of the tapes, therefore, constitutes a *de minimis* violation of § 2511, see *Nalley*, 53 F.3d at 654 and does not warrant an award of damages under § 2520(c)(2)(B).

b. Punitive damages

Plaintiffs also request that the court award them punitive damages pursuant to § 2520(b)(2) equal to the amount awarded as statutory damages. In order to receive punitive damages, the plaintiffs must show that the defendant acted "wantonly recklessly, or maliciously." *Jacobson v. Rose*, 592 F.2d 515, 520 (9th Cir. 1978), *cert. denied*, 442 U.S. 930 (1979). Even if a defendant cannot establish a "good faith" defense under

§ 2520(d), evidence that the defendant believed he was acting lawfully is pertinent to a determination of whether he acted with malice or wantonness so as to render punitive damages appropriate. *Campiti v Walonis*, 467 F. Supp. 464 (D. Mass. 1979). *See Shaver*, 799 F. Supp. At 580 (quoting *Campiti*). In the absence of disputed material facts, a court may decide the issue of a successful plaintiff's entitlement to punitive damages under Title III as a matter of law. id. at 580-81 (the court ruled as a matter of law that the defendant's actions did not warrant the imposition of punitive damages).

In the present case, Plaintiffs do not dispute Defendant's statement that he believed he was not violating the law by tap-recording conversations from his own extension phone for the purpose of defending against a wrongful termination. The evidence thus demonstrates that Defendant believed, albeit mistakenly, that his actions were lawful. The Court determines, therefore, as a matter of law that Defendant's actions were not

wanton, reckless or malicious. Accordingly, Plaintiffs are not entitled to punitive damages under the statute.

c. Equitable or declaratory relief

Plaintiffs next seek an order from this court enjoining Defendant from conducting further wiretapping activities and disclosing any information in any form to any other person. They further request that Defendant be ordered to turn over all tapes in his possession or in the custody or control of his attorneys.

Section 2520(b)(1) reserves as a remedy to anyone subjected to an unlawful interception "such...equitable or declaratory relief as may be appropriate." In *Williams v. Poulos*,p 11 F.3d 271 (1st Cir. 1993), the court considered this statutory language and determined "that, in order to provide aggrieved plaintiffs with 'appropriate' relief, courts ordinarily should completely enjoin persons in possession of illegally intercepted information from disclosing and/or using that information." id.at 287. This Court agrees that injunctive relief

as requested by Plaintiffs is appropriate. Defendant should therefore be enjoined from any further wiretapping activity and from disclosing the contents of the instant intercepted communications in any form to any person. Counsel for the parties are directed to confer regarding appropriate injunctive relief so as to avoid further use or disclosure violations and file counsels' suggestions with the Court within five (5) days.

d. Attorney's fees and costs

Section 2520(b)(3) also provides that appropriate relief may include an award of reasonable attorney's fees and other litigation costs reasonably incurred. Plaintiffs request that the Court find Defendant liable for such costs and allow Plaintiffs to submit a detailed request. In light of the foregoing, the Court finds that an award of reasonable attorney's fee and litigation costs reasonable incurred is appropriate. The Court direct Plaintiffs to file a detailed request upon disposition of Plaintiffs' remaining state law claims.

In light of the Court's disposition of Plaintiffs' federal statutory claim and its grant of equitable relief, the court denies Defendant's appeal and objection from ruling of Magistrate filed May 22, 1997, and hereby affirms the magistrate's order. In any event, the present order renders moot Defendant's appeal of the magistrate's order and Plaintiff's motion in limine filed June 3, 1997.

IT IS THEREFORE ORDERED that:

1. Defendant's motion to dismiss or alternative motion for summary judgment is DENIED in all respects;

2. Plaintiffs' motion for summary judgment is GRANTED as to liability and certain damages under the federal statute;

3. The court ENJOINS Defendant from engaging in further wiretapping activity and from disclosing the contents of the unlawfully intercepted communications in any form to any person;

4. Counsel are DIRECTED to confer regarding appropriate equitable relief so as to avoid further Title III violations and to file with the court counsel's suggestions within five (5) days;

5. Plaintiffs' motion in limini filed June3, 1997, is DENIED as moot; and,

6. Defendant's appeal and abjection from ruling of Magistrate is DENIED, and the Magistrate's order is AFFIRMED.

Dated this 8th day of July, 1997

/s/ _____
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 7-8-97

APPENDIX "B"

ORDER FILED OCTOBER 2, 1998

NOT PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ODIS KINSEY, an individual; GARY MONTGOMERY, an individual,	)	
Plaintiffs-Appellees	)	
v.	)	No. 97-6289 (D.C. No. CIV-96-1902-C) (W.D. Okla.)
WILLIE CASE,	)	
Defendant, Appellant	)	

ORDER AND JUDGMENT*

Before **PORFILIO, KELLY,** and **HENRY,** Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The case is therefore

ordered submitted without oral argument.

Defendant Willie Case appeals from the district court's grant of summary judgment against him on plaintiffs' claim under Title III of the Omnibus crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520, which provides a civil remedy in favor of any person whose wire, oral or electronic communication is intercepted in violation of the Act. We review the district court's grant of summary judgment de novo, *see* Seymore v. Shawver & Sons, Inc., 111 F.3d 794, 797 (10th Cir.), cert. denied, 118 S. Ct. 342 (1997), and affirm.

Briefly stated, the undisputed facts are as follows: Plaintiffs and defendant were teachers at Douglass High

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

School in Oklahoma City. Many classrooms in the school have

telephones that are connected to the principal's office by specialized extensions. Over his telephone extension, defendant personally heard plaintiffs making plans to orchestrate his termination, and he subsequently began tape recording all of their (and apparently others') telephone calls from his extension for a three-month period. He recorded eighteen cassette tapes of phone conversations, including sixty-six calls between plaintiffs and various third parties. Plaintiffs did not consent to the recording of their conversations. Defendant disclosed the tapes of plaintiffs' conversations to his attorney in this matter and to another attorney in a related state court proceeding.

In its thorough and well-reasoned decision, the district court determined that the telephone conversations were wire communications within the meaning of §2510 (1), that defendant's interception of them did not fall within the telephone or business extension exemption created by §§ 2510(4) and (5), that defendant's self-defense and good-faith

defenses were not recognized defenses to violations of the Act, and that defendant had disclosed the intercepted communications. It therefore concluded that defendant violated § 2511(1) with respect to each plaintiff. The court awarded plaintiffs $10,000 each as statutory damages under § 2520(c)(2)(B), plus attorney fees, and enjoined defendant from engaging in further wiretapping activity and disclosure of intercepted communications.

Defendant raises three arguments on appeal. He contends first that plaintiffs did not have a legitimate expectation of privacy in their communications over the school telephone system and that their communications were therefore not protected by the Act. Defendant, however, intercepted *wire* communications, and "[w]ire communications, unlike oral communications, are protected against interception by electronic, mechanical, and other devices regardless of the speaker's expectation of privacy." Briggs v. American Air Filter Co., 630 F.2d 414, 417 n.4 (5th Cir. 1980) (comparing §

2510(1) with § 2510(2); see also United States v. Harpel, 493 F.2d 346, 349 (10th Cir. 1974) (recognizing lack of requirement to prove reasonable expectation of privacy with regard to intercepted wire communications).

Defendant next contends that his interception of plaintiffs' telephone conversations was justified on the grounds of self-defense; that is, he was trying to protect himself from plaintiffs's wrongful conspiracy to terminate his employment. We agree with the district court that this is not a recognized defense under the statue.

Finally, defendant contends that because he had filed an earlier action against plaintiffs in state court, "jurisdiction was in the state court and the federal court should have yielded to the proceedings in state court and [defendant] adopts and re-urges his argument as raised in the Court below." Appellant's Br. at 15. Fed. R. App. P. 28(a)(6) requires that an appellant's "argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the

authorities, statutes, and parts of the record relied on." The rule does not allow the incorporation by reference of arguments made in the district court. See Graphic controls Corp v. Utah Med. Prods., Inc., 149 F.3d 1382, 1385 (Fed. Cir. 1998); Pitsonbarger v. Gramley, 141 F.3d 728, 740 (7th Cir. 1998), petition for cert. Filed, (U.S. July, 8, 1998) (No. 98-5153). We therefore will not consider this argument.

The judgment of the united States District Court for the Western District of Oklahoma is AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge